TESTIMONY OF
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BEFORE THE HOUSE COMMITTEE ON GOVERNMENT REFORM
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I appreciate the opportunity to testify on the federal tribal recognition process.

Continuing evidence of money, politics and personal agendas impacting tribal recognition decisions has led the Department of Interior's Inspector General to initiate yet another review of improprieties in the BIA's recognition process. This investigation, whatever its outcome, adds credibility to our repeated criticism that the BIA is skirting and subverting the law, and defying fundamental fairness. It is an agency that is lawless, out of control, arbitrary and capricious.

Critically and immediately, Congress should enact a moratorium on Bureau of Indian Affairs (BIA) tribal acknowledgment decisions or appeals affecting Connecticut and perhaps the Nation, and initiate a full and far-reaching investigation of the BIA's actions.

The need for a moratorium is demonstrated dramatically by an internal BIA memorandum -- discovered during review of documents for our administrative appeal in the Schaghticoke decision -- which provides a blueprint for BIA senior officials to disregard and distort the law. This unconscionable pattern and practice cannot be permitted to continue.

Equally important is immediate, complete and accurate disclosure of all the lobbyists, lawyers, and other similar influences - and amounts paid to them by petitioning tribal groups or related financial interests and investors. Sunshine would be a particularly powerful disinfectant in this morass of money, politics and personal agendas. The BIA memorandum opens a window on a concealed world of result driven decisions -- overreaching that skirts and subverts the rule of law.

Who will force legal compliance and accountability? Not the newly appointed Assistant Secretary for Indian Affairs, David Anderson, who was recently confirmed by the U.S. Senate. We have learned that he has recused himself from all recognition decisions. As a result, Secretary of Interior Gale Norton has delegated these critical powers to his principal deputy, Aurene Martin—whose position does not require Senate confirmation. I submit for the Committee's record a copy of the Secretary's order. I am deeply troubled that Mr. Anderson will be unable to perform some of the key responsibilities of the office for which he was nominated

and confirmed by Congress. Recusal on individual cases may be appropriate for particular ethics or conflict of interest reasons specific to the case at hand. But such general, across the board delegation is severely problematic, raising constitutional and statutory questions about overbroad illegal delegation and avoidance of proper responsibility. At the very least, this delegation of powers circumvents Congressional authority to review and confirm the person entrusted with making critical tribal recognition decisions. Very significantly, it bypasses Congressional oversight and scrutiny of the inherent legislative function of according government to government status to Indian tribes. These issues merit immediate, critical scrutiny.

On Monday, I was joined by a powerful statewide coalition composed of city, town and citizens groups in an appeal to the federal Interior Board of Indian Appeals (IBIA) of the decision to accord federal recognition to the Schaghticoke Tribal Nation. Although I am hopeful that the IBIA will review this decision in an objective fair, impartial manner and determine that the decision was critically lacking in evidence necessary for a finding of Indian recognition, the problems with the recognition process are so deep and pervasive that they require immediate sweeping Congressional changes.

Far reaching, fundamental reform is critical to restoring the integrity and credibility of the process. Indeed, the argument may be made that the Department of Interior currently has an unavoidable conflict of interest -- responsible for advocating and protecting Native American interests as trustee on the one hand, and at the same time deciding objectively among different tribes which ones merit federal recognition and all the benefits that flow from it.

First, Congress should create an independent agency -- insulated from politics or lobbying -- to make tribal recognition decisions. It must have nonpartisan, disinterested members, staggered terms, and ample resources. There is compelling precedent for such an independent agency -- the Securities and Exchange Commission, for example, or the Federal Communications Commission, and the Federal Trade Commission, which deal professionally and promptly with topics that require extraordinary expertise, impartiality, and fairness, and where the Commissioners have no stake in the outcome of the decision. Sufficient resources in staff and other capabilities – now lacking in the BIA – also must be provided.

Second, Congress should adopt the tribal recognition criteria in statute, reducing the likelihood that the BIA – or a new, independent agency-- will be able to stretch or ignore regulatory standards in an effort to recognize an undeserving petitioner. Congress should also enact measures to ensure meaningful participation by the entities and people directly impacted by a recognition decision -- including equitable and equal rights to all information submitted by all parties. One of the most frustrating and startling consequences of the current review process in the BIA is the potential for manipulation and disregard of the seven mandatory criteria for recognition—a potential that the General Accounting Office (GAO) and Inspector General reports found has occurred in recent petitions.

Finally, Congress should provide additional much-needed, well-deserved resources and authority for towns, cities and Indian groups alike in an effort to reduce the increasing role of gaming money in the recognition process. Federal assistance is necessary and appropriate, in light of the increasing burdens that tribal members, towns, cities and the state must bear in

retaining experts in archeology, genealogy, history and other areas -- all necessary to participate meaningfully in the recognition process. Because recognition has such critical, irrevocable consequences, all involved—petitioning groups, the public, local communities, states -- must have confidence in the fairness and impartiality of the process. That confidence has been severely compromised in recent times. I urge the committee to approve these bills and begin the process of overhauling the system so that public faith and trust can be restored.

The central principle of this reform should be: Tribes that meet the seven legally established criteria deserve federal recognition and should receive it. Groups that do not meet the criteria should not be accorded this sovereign status.

The present system for recognizing Indian tribes is fatally and fundamentally flawed. It is in serious need of reform to ensure that recognition decisions -- which have such profound ramifications -- are lawful, fair, objective and timely. After more than a dozen years of experience with tribal recognition issues, I strongly and firmly believe that fundamental, far-reaching reform is necessary.

In a January, 2004, ruling involving a petition from the Schaghticoke Tribal Nation, an Indian group in Connecticut, the BIA inexplicably reversed its preliminary decision to deny federal recognition to the Schaghticoke petitioner, finding that the petitioner had met all seven mandatory criteria, despite the lack of any evidence to establish that the group met two of the mandatory criteria -- political autonomy and social community—for long periods of history. The basis for this decision—which directly conflicted with not only the preliminary negative decision in the same petition but also with prior BIA precedent and regulatory requirements-- remained a mystery until several weeks later, when an internal staff briefing paper became available. The briefing paper created a road map -- as close to a smoking gun as we've seen -- for the agency to reverse its prior negative finding, despite the admitted lack of credible evidence of at least three of the seven mandatory criteria. I have attached that briefing paper to my testimony.

The briefing paper sets forth options to Acting Assistant Secretary Martin for addressing two issues staff acknowledged were potentially fatal to the Schaghticoke petition: (1) little or no evidence of the petitioner's political influence and authority, one of the mandatory regulatory criteria, for two substantial historical periods totaling over a century; and (2) serious problems associated with the internal fighting among two factions of the group.

With respect to the lack of evidence, the memo demonstrates, by its owns words and analysis, its disregard for the legal standards and precedents in order to arrive at a particular desired result. While acknowledging that Option 2-- declining to acknowledge the group—would "maintain[] the current interpretation of the regulations and established precedents concerning how continuous tribal existence is demonstrated," the memo posited a way to achieve a positive finding even though the petition lacked evidence of mandatory criteria for two historical periods: Option 1, which was to "[a]cknowledge the Schaghticoke under the regulations despite the two historical periods with little or no direct political evidence, based on the continual state relationship with a reservation and the continuity of a well defined community throughout its history."

In other words, declining to acknowledge the group meant following the law and the agency's own precedent. Yet, despite this clearly correct legal path, the BIA chose option 1, and acknowledged the petitioner by substituting state recognition in lieu of evidence for large periods of time. The BIA chose this option despite its own concession that it would create a "lesser standard," and despite the clear evidence in the record showing that the "continual state relationship" was not based on the standards necessary for federal recognition.

This BIA memo confirms that recognition of Schaghticoke petitioner required the BIA to disregard its own regulations and long accepted precedents, ignore substantial gaps in the evidence, and "revise," yet again, its recent pronouncements on the meaning and import of the State's relationship with the group. In fact, the BIA has now "revised" the legal import of state recognition no less than four times in only two years, each time adopting a view that would permit it to reach the result it wished, regardless of whether the group met the standards required by the regulations and precedents.

This result- driven agenda and attitude are mirrored in our experience with other recognition petitions. In the Eastern Pequot and Paucatuck Eastern petitions, the former head of the BIA unilaterally overturned civil service staff findings that the two Indian groups failed to meet several of the seven mandatory regulatory criteria. He also issued an illegal directive barring staff from conducting necessary independent research and prohibiting the BIA from considering information submitted after an arbitrarily-selected date without notice to interested parties in pending recognition cases.

Not content to stop there, the BIA went even further in recognizing a single Eastern Pequot tribe in Connecticut comprised of two competing groups-- the Eastern Pequot and the Paucatuck Eastern Pequots-- despite the fact that these groups had filed separate, conflicting petitions for recognition, and despite the substantial gaps in evidence in both tribal petitions. To circumvent the law, the BIA again distorted the relationship between the state of Connecticut and the Eastern Pequot group in an attempt to bridge those gaps, contrary to the BIA's own regulations. That decision is currently on appeal before the IBIA.

The criteria for federal recognition as a Indian Tribe have been carefully developed over 30 years, and are based primarily on Supreme Court precedent articulating the relationship of Indian tribes to the federal government. Present legal rules require any tribal group seeking federal recognition to meet seven distinct criteria – aimed at proving the petitioning tribe's continuous existence as a distinct community, ruled by a formal government, and descent from a sovereign, historical tribe, among others. Distorting and defying these rules, as the BIA memo clearly demonstrates, the BIA's political leaders have disregarded these standards, misapplied evidence, and denied state and local governments a fair opportunity to be heard.

Connecticut's experience is not unique. In 2002, the GAO issued a report documenting significant flaws in the present system, including uncertainty and inconsistency in recent BIA recognition decisions and lack of adherence to the seven mandatory criteria. The GAO report also cited lengthy delays in the recognition process -- including inexcusable delays by the BIA in providing critical petition documents to interested parties like the states and surrounding towns.

The United States Department of the Interior's Office of the Inspector General (OIG) also found numerous irregularities in the way in which the Bureau of Indian Affairs handled federal recognition decisions involving six petitioners. The report documents that the then Assistant Secretary and Deputy Assistant Secretary either rewrote professional staff research reports or ordered the rewrite by the research staff, so that petitioners who hadn't met the standards would be approved. This Assistant Secretary himself admitted that "acknowledgement decisions are political," although he himself later expressed concern that the huge amount of gaming money behind petitions would lead to petitions being approved that did not meet the standards.

To date, the BIA has done nothing to cure these dramatic defects in the recognition process, and as a result of the BIA memo, the Inspector General has once again initiated an investigation of this clearly flawed process.

The impacts of federal recognition of an Indian tribe cannot be understated -- underscoring the urgent need for reform. A decision to acknowledge an Indian tribe has profound and irreversible effects on tribes, states, local communities and the public. Federal recognition creates a government-to-government relationship between the tribe and the federal government and makes the tribe a quasi-sovereign nation. A federally recognized tribe is entitled to certain privileges and immunities under federal law: They are exempt from most state and local laws and land use and environmental regulations. They enjoy immunity from suit. They may seek to expand their land base by pursuing land claims against private landowners, or seeking to place land into trust under the Indian Reorganization Act. They are insulated from many worker protection statutes relating, for example, to the minimum wage or collective bargaining protections as well as health and safety codes.

Also, the enactment of the Indian Gaming Regulatory Act (IGRA) more than a decade ago has changed the face of recognition dramatically by permitting federally recognized tribes to operate commercial gaming operations in many states. This law has vastly increased the financial stakes involved in federal recognition, providing an incentive to wealthy non-Indian backers to bankroll the petitions of tribes in states where gaming is permitted on the promise of riches once recognition is achieved and casinos are built. Investors in the Schaghticoke and the Eastern Pequot petitions have sunk tens of millions of dollars into the quest for recognition and casinos. A number of other groups are seeking recognition, most with the avowed intention to own and operate commercial gaming establishments if approved.

The enormity of the interests and the financial incentives at stake make public confidence in the integrity and efficacy of recognition decisions all the more essential. Sadly, due to the maneuverings that we have experienced, public respect and trust in the current process have completely evaporated. The current system is totally lacking in safeguards to protect the petitioning groups and the BIA from undue influence by monied interests. In addition, the process is shrouded in secrecy. State and local governments and private citizens directly impacted by a recognition application do not have effective or equal access to information submitted by the applicant or to the historical evidence and research by BIA staff. The BIA not only assists the applicant -- an applicant often financed by investors with far greater financial resources to devote to federal recognition than the state, towns and citizens affected by the

application -- it fails to provide basic information to those who may be opposed to the application.

The BIA's delay in providing necessary documents to Connecticut and local interested parties in the Eastern Pequot/Paucatuck Eastern petitions forced the state and towns to sue in federal district court to compel the BIA to produce the records in time for the state and local parties to have a meaningful opportunity to submit comments in the acknowledgment proceeding. Although the BIA complied with the court order to produce records, the federal action remains pending before the United States Court of Appeals for the Second Circuit with respect to the State's remaining claims that the BIA refuses to abide by its own regulations, and continues to change the rules of the game without notice to the parties or legal basis.

I ask Congress to act swiftly and strongly to reform the present system, remove the incentives for abuse, and restore credibility and public confidence in the process and the result.

I wish to thank the committee for allowing me this opportunity to address this important issue and urge the committee's further consideration of these proposals.